INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Barker v. *United States*, 178 F.2d 803, certiorari denied, 339 U.S. 968	7, 10, 11
Freeman v. *United States*, 86 F.2d 243, certiorari denied, 299 U.S. 616	10
Maenza v. *United States*, 242 F.2d 339	11
Ross v. *United States*, 180 F.2d 160	10
Simmons v. *Zerbst*, 18 F. Supp. 929	11
Sutton v. *United States*, 157 F.2d 661	10
United States v. *Bando*, 244 F.2d 833, certiorari denied, 355 U.S. 844	7, 11
United States v. *Brandenburg*, 144 F.2d 656	11
United States v. *Brig Neurea*, 19 Howard 92	9-10
United States v. *Carll*, 105 U.S. 611	10
United States v. *Gooding*, 12 Wheat. 460	9
United States v. *Miller*, 17 F. Supp. 65	11
United States ex rel. Mills v. *Reing*, 191 F.2d 297, certiorari denied, 343 U.S. 909	11
United States v. *Rappaport*, 156 F. Supp. 159	7

Statutes and rule:

Act of April 6, 1956 (70 Stat. 100)	3
18 U.S.C. (1952 ed.) 1073	2, 3, 5, 6, 7, 8, 9, 10, 11
Rule 7(f), F.R. Cr. P.	10

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 273

ROCCO SALVATORE LUPINO AND JOHN FRANK AZZONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A 21-28) is not yet reported. The opinion of the District Court (Pet. App. A 17-20, R. 9-12) is reported at 171 F. Supp. 648.[1]

[1] Although the full text of the District Court's opinion is not printed in the Record or in the Appendix to the Petition, the portion relevant to the issues presented here is so printed.

JURISDICTION

The judgments of the Court of Appeals were entered on July 7, 1959. The petition for writ of certiorari was filed on August 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of the Fugitive Felon Act, 18 U.S.C. (1952 ed.) 1073, which punishes interstate flight to avoid prosecution, requires allegation and proof of the existence of a state prosecution, or, alternatively, allegation and proof of the commission of a state offense by the defendant.

STATUTE INVOLVED

18 U.S.C. (1952 ed.) 1073 provided:

Flight to avoid prosecution or giving testimony.

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement.[2]

STATEMENT

Petitioners were separately indicted in the District Court for the District of Minnesota in two counts for violations of 18 U.S.C. (1952 ed.) 1073, *supra*. The first count of each indictment charged that each petitioner fled in interstate commerce from Minnesota, to Florence, South Carolina, and elsewhere, "with intent to avoid prosecution under the laws of the State of Minnesota for the crime of murder in the first degree as defined by the laws of the State of Minnesota, to-wit, the murder of one Anthony Ralph DeVito committed on or about the 28th day of September, 1953, in the Third Division, State and District of Minnesota." The second count charged the commission of the same offense except that it alleged that the flight was "to avoid prosecution under the laws of the State of Minnesota for the crime of kidnapping, as defined by the laws of the State of Minnesota, to-wit, the kidnaping of one Anthony Ralph DeVito" at or about the same time and place charged in count one. (R. 1-4.)

Petitioners made pretrial motions to dismiss these indictments on the grounds that they did not state

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[2] By the Act of April 6, 1956 (70 Stat. 100), the words ", arson punishable as a felony" were added after "assault with a dangerous weapon." The statute is printed here as in effect at the time the offenses charged were committed.

offenses against the United States because there was no allegation that a prosecution had been instituted against them by the State of Minnesota (R. 4-9, 13). These motions were denied by the District Court in a memorandum opinion (R. 9-12).

During the trial, it was stipulated that no charges had been brought against either defendant by the State of Minnesota for the crime of murder or kidnaping of Anthony DeVito (R. 14). Evidence was received from which the jury could have found that, subsequent to the time DeVito disappeared and prior to and during the time of the departure and travel of each of the petitioners from the State of Minnesota, the police of St. Paul and Minneapolis, Minnesota, were seeking to apprehend both petitioners in connection with the then suspected murder of DeVito, and additional evidence was introduced from which the jury could find that each of the petitioners knew of these apprehension efforts (R. 43-44).[3]

The District Court instructed the jury that, before it could find either petitioner guilty of the offenses charged, it had to be convinced beyond a reasonable doubt that he had committed the murder and the kidnaping charged in the indictments (R. 20, 22, 24). The court further instructed the jury that, in order to return a verdict of guilty, it had to find beyond a reasonable doubt that the particular defendant had "fled from Minnesota across a state line with the intent to avoid prosecution for the crimes of murder

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[3] Pursuant to the rules of the Court of Appeals for the Eighth Circuit, the record in the District Court was stipulated (R. 41-48).

and kidnapping" (R. 22). In amplifying this instruction, the court stated (R. 23):

> It is not required that at the time of interstate travel there be then existing charges by state authorities through indictment or complaint or otherwise; but the intent to avoid prosecution does require that the defendant be aware at the time of his interstate travel of the fact that the crime of murder or kidnapping of DeVito had been committed and that at that time the defendant had an apprehension that he would or might be the subject of a Minnesota prosecution for such crime; and further that such apprehension on the part of the defendant or defendants was a reasonable one and not merely a figment of his imagination.

The jury returned verdicts of guilty on both counts against each of the petitioners (R. 32, 33). Judgment was entered on the verdicts and each petitioner received a general sentence of five years' imprisonment and a fine of $5000.00 (R. 34-36). On appeal, the Court of Appeals affirmed.

ARGUMENT

1. Petitioners' principal contention is that the courts below erred in holding that the Fugitive Felon Act, 18 U.S.C. (1952 ed.) 1073, *supra*, pp. 2-3, does not require the institution of a state criminal prosecution for one of the specified crimes as a condition precedent to the initiation of a federal prosecution for violation of the Act.

Section 1073 defines two offenses. The first is movement or travel in interstate commerce with in-

tent to avoid prosecution for certain enumerated crimes, under the laws of the place from which the defendant flees. The second is movement or travel in interstate commerce with intent to avoid giving testimony in criminal proceedings in a place in which the commission of an offense punishable by imprisonment in a penitentiary is charged. Before a prosecution can be instituted under the latter provision of the statute, a state criminal charge would have to be pending; this follows from the plain meaning of the statutory language "to avoid giving testimony in any criminal proceedings." . By necessary implication, "criminal proceedings" requires the existence of a pending criminal charge of some sort. However, petitioners were charged not with violating the second part of the statute but with fleeing from Minnesota with intent to avoid prosecution. It is not an essential element of this offense that a state criminal proceeding has been instituted or that a state criminal charge be pending. Prosecution is avoided by flight whether or not the prosecutive machinery has been set in motion. Moreover, it is a principal purpose of Section 1073 to permit the Federal Government to assist the states in the apprehension of those who flee from justice across interstate lines. If anything, the need for the machinery of the statute is greatest where prosecution has not yet begun, for a pending prosecution provides its own safeguards against flight (identification, fingerprinting, photographing, possible denial of bail, etc.).

The two other courts of appeals which have had occasion to consider this question are in agreement

with the decision below. *United States* v. *Bando*, 244 F.2d 833 (C.A. 2), certiorari denied, 355 U.S. 844; *Barker* v. *United States*, 178 F.2d 803 (C.A. 5), certiorari denied, 339 U.S. 968.[4] In the *Bando* case, the Court of Appeals for the Second Circuit, addressing itself to the identical issue raised by petitioners, stated (244 F.2d at 843):

> An analysis of Sec. 1073 does not support any such narrow and strained construction. The words "to avoid prosecution" mean "to avoid being prosecuted." The statute does not say "to avoid *a pending* prosecution." Nor is the word "charged" used in the first half of Sec. 1073 in relation to the flight "to avoid prosecution"; but it is used, quite naturally, in the second half of Sec. 1073 in relation to a flight "to avoid giving testimony." The two are separate crimes. The latter requires some pending criminal proceeding. The former does not. * * *

2. Petitioners also contend that Section 1073 requires allegation and proof that the defendant perpetrated the state offenses involved, and that this statutory standard was not met in this case. These arguments are likewise without merit.

(*a*). There is nothing in the language of Section 1073 to suggest any requirement of allegation and proof of the state offense. The first part of this section penalizes travel in interstate commerce with intent to avoid prosecution, or custody or confinement

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[4] The only decision to the contrary is that of a District Court. *United States* v. *Rappaport*, 156 F. Supp. 159 (N.D. Ill.).

after conviction, with respect to certain specified crimes. Petitioners' interpretation would amend the statute to provide that the offense prohibited thereby can be committed only if the accused is, in fact, guilty of the state offense.

The purpose of Section 1073 is not to convert the state offenses listed in the section into federal offenses; that would constitute a large assumption of the burdens of state responsibility by the Federal Government. To the contrary, a principal purpose of the statute was to enable the Federal Government to assist the states to determine whether or not the fugitive was in fact guilty of an offense. To require that those who flee the state to avoid prosecution be proved guilty of the state offense, beyond a reasonable doubt, in the federal courts would seriously restrict the applicability of the statute and, in effect, would prejudge state determination of the same issue. The important factor is to keep potential defendants within the bounds of the state so that the state judicial process can determine their liability to punishment.

Petitioners concede that the statute and the demands of the Constitution would be satisfied by requiring allegation and proof of a prior state prosecution (Pet. 13). Presumably, a number of state prosecutions will end in acquittals. However, under petitioners' own view, this possibility of acquittal does not bar a federal prosecution for violation of Section 1073. That being the case, there would appear to be no reason why the possibility of acquittal—*i.e.*, the possibility of innocence of the fleeing defendant of the state charge—should be a bar to a federal prosecu-

tion where formal state proceedings have not yet been initiated. In both instances the relevant factor is that prescribed in the statute itself—the intent to avoid prosecution. Where that intent, as here, is alleged and proved, the requirements of the statute have been met.[5]

(*b*). While, as just indicated, it is our position that Section 1073 does not require proof of the commission of a state crime by the defendant in the federal case, that question need not be decided here since the District Court required such proof and charged the jury that the petitioners could be found guilty of violating Section 1073 only if it were found beyond a reasonable doubt that they kidnapped and murdered Anthony DeVito. By their verdict of guilty the jury, of course, indicated that the proof met this standard and no complaint is made that the verdict was not supported by the evidence.

As for the sufficiency of the indictment, it charged the commission of the offenses in the words of the statute, and as such it was clearly sufficient. *United States* v. *Gooding*, 12 Wheat. 460, 474; *United States*

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[5] Petitioners also say that, if Section 1073 does not require proof that the defendants committed the state crime, it is void for lack of due process. But Congress, under its power to regulate interstate commerce, can provide, we submit, that the facilities of interstate commerce should not be used for flight to avoid prosecution, regardless of the ultimate guilt or innocence of the person using such facilities for such a purpose. In other words, Congress can properly require that potential defendants do not deliberately render themselves immune, by means of flight, to state prosecutorial and judicial process.

v. *Brig Neurea*, 19 Howard 92, 94; *Freeman* v. *United States*, 86 F.2d 243, 244 (C.A. 5), certiorari denied, 299 U.S. 616; *Sutton* v. *United States*, 157 F.2d 661, 663 (C.A. 5); *Ross* v. *United States*, 180 F.2d 160, 164 (C.A. 6); and, more particularly with reference to pleading an offense under Section 1073, *Barker* v. *United States, supra*, 178 F.2d at 805.[6] Even if a requirement of proof of the state offense were to be read into Section 1073, this requirement would not thereby become an explicit part of the indictment. It is well established that an indictment need not plead all of the possible refinements of proof which may be required, as long as it adequately pleads the offense in the statutory terms. Any lack of particularity can be cured by a bill of particulars. Rule 7(f), F.R. Cr. P.

Petitioners assert (Pet. 12) that, in every case which has construed Section 1073, the courts have taken the position that the statute was intended to punish "only one who in fact had committed an offense against a state or who had been charged by a state with an offense." Actually, however, no decision has held that the commission of a state offense must

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[6] Petitioners' cases do not fit any of the exceptions to this rule. In *United States* v. *Carll*, 105 U.S. 611, the indictment, though framed in the language of the statute, was set aside because of a failure to allege the intent that the instrument was uttered with knowledge that it was counterfeit within the meaning of the statute. In this case, the indictment alleged with particularity that petitioners fled interstate "with intent to avoid prosecution under the laws of the State of Minnesota for the crime of murder * * * to-wit, the murder of one Anthony Ralph DeVito * * *" (R. 1-4).

be alleged. Of the cases cited at Pet. 12, in *United States ex rel. Mills* v. *Reing*, 191 F.2d 297 (C.A. 3), certiorari denied, 343 U.S. 909, the indictment upon which the accused was being held was identical in all material respects with the indictments in this case, and, although a state charge was in fact pending, there is no discussion by the court of any necessity to allege and prove the commission of a state crime. The conviction for violating Section 1073 was set aside in *Macnza* v. *United States*, 212 F.2d 339 (C.A. 5), because of insufficient evidence, and, while the indictment charged that the state offense of murder had been committed by the defendant, there is no suggestion in the opinion that such an averment was necessary. In *United States* v. *Miller*, 17 F. Supp. 65, 67 (W.D. Ky.), while the court in overruling a demurrer to the indictment held that in order to sustain a conviction under Section 1073 it would be necessary for the government to prove that the accused had committed a state offense denounced in the statute, there is no holding that this need be alleged in the indictment. In *Simmons* v. *Zerbst*, 18 F. Supp. 929 (N.D. Ga.), the issue was the constitutionality of the statute, and, while the indictment charged the commission of a state offense by the accused, the necessity for such an allegation was neither considered or passed on by the court. Similarly, the *Barker* and *Bando* cases, *supra*, do not hold that an allegation that a state offense was committed must be included in the indictment. *United States* v. *Brandenburg*, 144 F.2d 656 (C.A. 3), in reversing a conviction for misprision of a felony, turned on the issue of whether the person

who fled to avoid prosecution had committed the type of offense covered by the then existing provisions of Section 1073.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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